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No. 526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

GENERAL OUTDOOR ADVERTISING CO., INC.,
Petitioner

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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October 1, 1957

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the United States Court of Claims (Appendix "B") is reported at 149 F. Supp. 163.

JURISDICTION

The judgment of the United States Court of Claims was entered on March 6, 1957. (R. 37.) A timely petition for rehearing was denied on May 8, 1957. (R. 81) By order of the Chief Justice on July 13, 1957, the time for filing a petition for certiorari was extended to and including October 5, 1957. (Appendix "C"). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255.

QUESTIONS PRESENTED

I

Petitioner, the taxpayer, filed a timely claims for refund of excess profits tax for the taxable years 1944 and 1945. The taxpayer alleged that the Commissioner, in determining invested capital, had erroneously valued the good will of taxpayer's constituent companies. The Commissioner then reexamined the valuation of good will and, in the process reexamined the valuation given to certain tangible assets of taxpayer's constituent companies, including land and buildings. After expiration of the limitation period but prior to rejection of the original claims, taxpayer filed amended claims asserting that undervaluation of land and buildings contributed to the Commissioner's erroneous determination of invested capital. The Commissioner disallowed the claims and the taxpayer brought this action for a refund in the United States Court of Claims. The Court of Claims, although agreeing with the taxpayer that the Commissioner had erred in undervaluing land and buildings, limited recovery on the ground that the valuation of land and buildings was not raised by taxpayer's original refund claims and thus was partially barred as to the amount of recovery by the two-year statute of limitations. (Appendix "A.")

The question presented is whether an amended claim for a refund, filed after the expiration of the limitation period but prior to rejection of an original claim, is barred by the statute of limitations even though the Commissioner, in determining the merits of the original claim, necessarily ascertained the facts upon which the amendment was based.

II

The Commissioner erroneously valued good will as an asset of taxpayer in 1925, instead of the good will of the

constituent companies whose stock it owned, contrary to Section 718 (a)(2) of the 1939 Internal Revenue Code. The Court fell into the same error.[1] (Appendix "A"—Statutes.) The application of Sections 714-720 of the Code was agreed to by the parties. Taxpayer is entitled to its cost of the stock of the constituent companies, measured by the value of the underlying assets of each, without the introduction of a novel factor of "negative good will," in a determination purported to follow A. R. M. 34, (1920), C. B. 2, p. 31. (Appendix "D", pp. 12, 13.) Albeit, the question presented is whether, under the long established ruling, the principles thereof can properly be applied inversely, to produce such a result as "negative good will" decided by the lower Court.

STATUTES INVOLVED

The statutory provisions involved are Internal Revenue Code of 1939, Sec. 322 (26 U.S.C. 1952 ed., Sec. 322); Secs. 714-720, inc., (26 U.S.C. Secs. 714-720); Sec. 718 (26 U.S.C. 1952 ed., Sec. 718); Sec. 204 (a), Revenue Act of 1924, 43 Stat. 253. (Appendix "A")

STATEMENT

Taxpayer is a New Jersey corporation engaged in the business of outdoor advertising. It was formed in 1925 by stockholders of a number of companies engaged in outdoor advertising and acquired stock in these companies and not their assets. Later, it became both a holding and an operating company.

During the taxable years involved in this case, 1944 and 1945, taxpayer filed excess profits tax returns. As it was entitled to do, taxpayer computed its excess profits tax credit on the invested capital "historical" method under Sections 714-720 of the Internal Revenue Code of 1939.

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1. Taxpayer reserves the right to argue this point completely upon granting of the petition.

Under this method of computation, taxpayer's invested capital consists largely of the stock of companies acquired in 1925, pursuant to an agreement among the stockholders of these companies. An issue in this case is the proper valuation to be placed on the stock of these companies, *i.e.*, the value of the underlying assets, including good will, of the various companies.

The agreement entered into by the stockholders of the companies whose stock was acquired by taxpayer was preceded by careful investigation of the net worth and earnings of the various companies. The accounts of each of the companies were audited and brought into accounting consistency. The value of the tangible assets of all the companies was appraised by well-known national appraisers. The value of the tangible assets, the earnings history and good will, were all considered by the parties in arriving at the distribution of the stock of taxpayer amongst the respective stockholders.

In determining taxpayer's invested capital, the Commissioner allowed $957,400 as good will and reduced the value of land and buildings of the separate companies, independently appraised in 1924, by a total of $1,739,066.28. The Commissioner had determined these values in a report dated November 5, 1943, in connection with his examination of taxpayer's returns for 1936 and later years, and to determine invested capital at December 31, 1939.

Original claims for refund were filed on July 29, 1949. These claims were grounded upon claimed increases in invested capital over the amount determined by the Commissioner. One reason given for the increases was good will.

A reexamination of the valuation of good will was made by the Commissioner in connection with the aforesaid claims for refund. An engineer, in a report dated March

3, 1950, explained why no more than $957,400 could be allowed for good will and necessarily reviewed the valuation features of land and buildings (real estate) and other tangible assets covered in the Commissioner's earlier engineering report of November 5, 1953.

Thereafter, taxpayer filed its amended claims for refund of April 3 and 14, 1950, asserting that there had been an independent appraisal made of tangible assets contemporaneously with the acquisition of stock of the constituent companies by taxpayer under the stockholder's agreement, and no reduction in value should be recognized.

The Commissioner determined taxpayer's invested capital at the beginning of the years 1941 through 1945 in specific amounts, including good will of $957,400, in accordance with the report of November 5, 1943. Except for the amounts of adjustments in respect of good will, land and buildings, it was agreed by the parties that this determination for these years was correct and proper in all respects.

The taxpayer filed suit in the Court of Claims to recover excess profits taxes for 1944 and 1945, alleging in its petition, as ground for recovery that taxpayer's equity invested capital and excess profits credit was erroneously determined. Both errors in valuation of good will and of land and buildings are specifically alleged.

The Court of Claims decided that while the Commissioner should have theoretically considered each constituent company separately and found the value of the stock it transferred to taxpayer, and included this in taxpayer's invested capital, the amount taxpayer was entitled to include in invested capital on account of the good will of each of the companies, it would seem proper to look at taxpayer's situation after the consolidation had been com-

pleted, in determining the value of everything it had acquired. There was no consolidation of assets of the companies. Determination of the stock value of each company here is not merely a theory. It is required by law.

The Court adopted the findings of the Trial Commissioner in saying that the Commissioner of Internal Revenue was not justified in reducing the valuation of land and buildings placed on them by taxpayer and that the reductions be restored for purposes of its excess profits credit.

The Court also decided that the amended claims first asserted an undervaluation of land and buildings, and that they could not be considered as amendments of the original claims, and hence was of the opinion, without citing any authority, that taxpayer could recover only those payments of taxes made within two years prior to the filing of the amended claims.

REASONS FOR GRANTING THE WRIT

I

The Decision Below is in Conflict with the Decision of the Second Circuit in Pink v. United States, 105 F. (2nd) 183, decided May 22, 1939, and with the Rule of this Court stated in United States v. Andrews, (1938), 302 U.S. 517, on the Question of Whether an Amended Claim for Refund, filed after the Expiration of the Limitation Period, but prior to Rejection of an Original Claim, is Barred by the Statute, even though the Commissioner, in Determining the Merits of the Original Claim, Necessarily Ascertained the Facts upon which the Amendment was Based.

In *Andrews, supra,* this Court analyzed its earlier decisions in *United States* v. *Memphis Cotton Oil Co.*, 288 U.S.

62; *United States* v. *Factors & Finance Co.*, 288 U.S. 89; *Bemis Bros. Bag Co.* v. *United States*, 289 U.S. 28; and *United States* v. *Henry Prentiss & Co., Inc.*, 288 U.S. 73; and in summary, stated this rule:

> "[1, 2] In all these cases the court found the analogies of pleading helpful in deciding whether the claim was in such form as to be subject to the proffered amendment at a time when a claim wholly new would have been barred; but the opinions point out that the analogy to pleading at law is not to be so slavishly followed as to ignore the necessities and realities of administrative procedure. Where a claim which the Commisioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim."

In *Andrews, supra,* the original claim was based on the loss of worthless stocks, whereas the amended claim, barred by the statute, unless germane to the first claim, was grounded on a switch from reported dividends as ordinary income subject to tax at regular rates, to a portion thereof alleged to be proceeds from the sale of stock in a company different from those whose stocks were claimed to be worthless, taxable as a capital gain at lower rates of tax. Under the rule, investigation of the amended claim required examination of other matters not germane to the first claim and such amended claim was held improper.

In *Pink* v. *United States*, 105 F(2d) 183 (CCA-2), decided May 22, 1939, in an opinion by Judge Swan, Judge Learned Hand dissenting on another point, the Court in announcing its interpretation of the rule laid down by *Andrews, supra*, said:

> "* * * Whether a new ground of recovery may be introduced after the statute has run by amending a pending claim filed in time depends upon the facts which an investigation of the original claim would disclose. Where the facts upon which the amendment is based would necessarily have been ascertained by the commissioner in determining the merits of the original claim, the amendment is proper. Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 53 S. Ct. 454, 77 L. Ed. 1011; United States v. Memphis Cotton Oil Co., 288 U.S. 62, 53 S. Ct. 278, 77 L. Ed. 619; United States v. Factors & Finance Co., 288 U.S. 89, 53 S. Ct. 287, 77 L. Ed. 633. The rule is otherwise when the amendment requires the examination of new matters which would not have been disclosed by an investigation of the original claim. United States v. Andrews, 302 U.S. 517, 58 S. Ct. 315, 82 L. Ed. 398. United States v. Garbutt Oil Co., 302 U.S. 528, 58 S. Ct. 320, 82 L. Ed. 405; Marks v. United States, 2 Cir., 98 F.2d 564. * * *"

The original claim in *Pink* went to the merits of whether insurance was the dominant business of the taxpayer. The amended claim brought into question whether fees it had received were improperly included in gross income. The second claim was too late to reach certain tax payments made, unless it could be treated as an amendment of the first claim. The Court reasoned that under the original claim, the Commissioner was called upon to investigate the various sources of the taxpayer's income and in so doing, necessarily discovered that the fees in question were neither investment or underwriting income, and this being so, it

might have been argued that the original claim was enough to require the Commissioner to compute the correct tax by excluding from gross income the fees in question. Further, it was concluded that if an amendment was necessary, it involved factors which necessarily would have been discovered by investigation of the original claim and that the second claim was a good amendment.

In the instant case, the original claims for refund, filed in 1949, were grounded on claimed increases in invested capital over that determined by the Commissioner for adjusted excess profits credit, one item being good will of $2,260,300.

Under a government engineering valuation report of November 5, 1943, made in connection with an examination of taxpayer's returns for 1936 and later years, and to determine invested capital at the end of the year 1939, the Commissioner calculated good will to be in the amount of $957,400 and reduced the value of land and buildings by $1,739,066.28.

An investigation of the original claims was made by the Commissioner. His engineer, in a report dated March 3, 1950, is shown to have ascertained, in connection with his reexamination of the value of good will, *that the Commissioner had previously reduced the value of land and buildings,* as aforesaid. *This fact was material to his considerations* in reaching a conclusion that good will should not be increased over the $957,400 previously allowed by the Commissioner. Both engineers' reports issued from the Engineering Section of the Revenue Agent's office in Chicago. The first engineering report was used in the making of the second report of March 3, 1950.

The amended claims were filed April 3 and 14, 1950. All claims were rejected on June 6, 1950.

The Trial Commissioner found on the evidence of the value of land and buildings, that there was not any justification for the reductions in the value of such property, made in the Commissioner's November 5, 1943 report. The defendant took no exception to this finding, and the lower Court adopted it.

However, the Court was of the opinion that the amended claims filed herein were not in fact amendments of the original claims, defendant having claimed that they first asserted an undervaluation of land and buildings, and that therefore, upon the restoration of the valuation thereof, taxpayer was entitled to recover only those payments of tax which were made within two years prior to the filing of the amended claims.

The lower Court's decision is clearly wrong. The *Pink* case is indistinguishable from that of taxpayer in that, under the facts, the rule in *Andrews* has been satisfied. The facts on which taxpayer's amendments were based, relating to the value of land and buildings, *were necessarily ascertained* by the Commissioner in determining the merits of the original claims, by the aforesaid March 3, 1950 report. Therefore, the amended claims of taxpayer are valid and proper amendments of its original claims, and recovery should not be limited as the lower Court decided.

Of importance to the Court is to know, upon the decision of this case, the decisions of the Court of Claims, on the question presented, are in conflict and confusing. The Court of Claims, since it was reversed in *Andrews*, has followed the established Rule in a number of cases, including *Addressograph-Multigraph Corp.* v. *United States*, 112 Ct. Clms. 201 (1949), 78 F. Supp. 111, 37 A.F.T.R. 53; *Midvale Company* v. *United States*, 133 Ct. Clms. 881 (1956), 138 F. Supp. 269, 49 A.F.T.R. 142, and *Red River Lumber Company* v. *United States*, 134 Ct. Clms. 444 (1956), 149 F. Supp. 148, 49 A.F.T.R. 676. These three cases are also indistinguishable from the instant case. The Rule should be restated by the Court in this case. It has not spoken on the Rule for many years.

II

The Decision of the Court Below failed to Apply Section 718(a)(2) of the 1939 Internal Revenue Code and violated the Established Concept of Appeals and Review Memorandum 34 (1920) by a "Negative Good Will" factor

The Court of Claims valued the good will of taxpayer instead of the good will of the separate companies as required by Section 718(a)(2) of the 1939 Internal Revenue Code. The parties agreed that Sections 714-720 were applicable. There was no consolidation of the companies or their assets. In arriving at its conclusions as to value of good will for invested capital purposes, the Court reached the same net figure of $957,400 found by the Commissioner. In arriving at this figure, the Commissioner recognized good will of $3,217,700 for all but five separate companies which were omitted entirely. The Commissioner found that five companies *included* in his calculation had $2,260,300 *less than zero* of good will. He in effect found that the *tangible assets* of these companies were worth $2,260,300 less than the Court found them to be after correcting the valuation error in land and buildings.

A simple illustration will prove this absurdity. A company starts with $500,000 capital. It initially makes a double-sized candy bar instead of one smaller sized to get "Lady Ruth" on the market. It succeeds on the demand, but loses $200,000 over the first five years, leaving it with $300,000 net worth, in tangible assets. Though it lost money, it created good will, but the amount cannot be measured under the earnings formula. For valuation purposes, the result is good will at zero value. Under the Commissioner's method, applied to this example, he would reduce the in-

vested capital by a further $240,000, arrived at by taking 10% of the average capital for the period of $400,000, or $40,000 and adding the losses of $200,000. This would produce a net capital of $60,000. Substituting the $240,000 in the example, it is the same as the $2,201,800 referred to in the following paragraph.

$2,201,800 of the "negative" good will pertains to Thomas Cusack Company. In 1925 it had been in business for 50 years and was solvent. It evidently had good will. However, under the Commissioner's calculations of good will, it showed a five-year net loss of $886,800. Loss years, as abnormal, should have been eliminated under the reasoning of *White & Wells Co.* v. *Commissioner* (CCA-2), an opinion by Swan, Circuit Judge, 50 F.(2nd) 120 wherein A.R.M. 34 was applied. Other adjustments to normal earnings were necessary, but ignored in our case. Good will value cannot be less than zero. It is fundamentally positive in character.

Taxpayer contends that the Commissioner in this respect violated the established concept of Appeals and Review Memorandum 34, 1920, Cumulative Bulletin 2, page 31 (Appendix "D" pp. 12, 13), which has been widely adopted for 37 years in the administration of federal taxes on income, gifts and estates, and cited in many cases. It has never been so applied.

This error is of general importance, although corporate excess profits taxes are not currently imposed. It will affect many persons. The inverse method of applying the principle of the ruling also endangers the tax revenues. It could affect value in every acquisition and liquidation of a going business whose stock is not regularly bought and sold, and has no fair market value except as measured by the value of underlying assets. The error also projects itself into the administration of the Federal Securities Act and 77-B Bankruptcy Reorganizations, the latter in

which stock allocations among new stockholders is a recurrent factor for consideration. The decision on this question is bad as a precedent.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

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October 1, 1957

APPENDIX "A"

1939 Internal Revenue Code

SEC. 322. REFUNDS AND CREDITS.

(b) Limitation on Allowance.—

(1) Period of limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

The pertinent part of Section 718 as applied in this case provides:

"Section 718. Equity invested capital —(a) Definition.

The Equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b)—

(1) Money paid in.
Money previously paid in for stock, or as paid-in surplus, or as a contribution to capital;

(2) Property paid in.
Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. * * *"

1924 Revenue Act
43 Stat. 253

TITLE II.—INCOME TAX

Part I.—GENERAL PROVISIONS

Basis for Determining Gain or Loss, Depletion, and Depreciation

"Sec. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *."

APPENDIX "B"

Opinion Below

IN THE UNITED STATES COURT OF CLAIMS

No. 270-52

(Decided March 6, 1957)

GENERAL OUTDOOR ADVERTISING CO., INC., v. THE UNITED STATES

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues for an alleged overpayment of excess profits taxes. It seeks to carry over to the taxable years 1944 and 1945 an unused excess profits credit to which it was entitled for the years 1941, 1942 and 1943. This excess profits credit was computed upon the basis of its invested capital.

It alleges that the defendant erroneously computed the good will which it was entitled to include in its equity invested capital, in that it deducted from so-called "positive" good will of $3,217,700 so-called "negative" good will in the amount of $2,260,300. Plaintiff alleges that it was erroneous to deduct any amount from the "positive" good will found by the Commissioner of Internal Revenue, the amount of which plaintiff does not contest. The propriety of this deduction is the only issue presented by the petition on the amount of good will to be included. It was the only basis for the claim for refund, except one that has now been abandoned.

Plaintiff also alleges that the defendant put an erroneous valuation on its land and buildings.

Defendant denies the allegations of the petition with reference to the valuation of land and buildings and affirmatively avers that the correctness of the valuations placed upon them cannot be prosecuted in this action because a claim for refund based thereon was not filed within the time allowed by statute.

Thus, there are two substantive issues presented, to wit, the proper valuation of good will and of lands and buildings, and the subsidiary issue of whether or not the amended claims for refund, which first asserted an undervaluation of land and buildings, can be considered proper amendments of the original claim for refund, which was filed in time.

Plaintiff was formed, effective February 26, 1925, by the consolidation of the Thomas Cusack Company and its subsidiaries and the Fulton group of companies. Plaintiff issued its stock partly in exchange for certain shares of stock of the Thomas Cusack Company and of each company in the Fulton group, and partly for cash and, in addition, it acquired for cash certain stock of the subsidiary companies.

The Commissioner of Internal Revenue, in computing the good will of the companies acquired by plaintiff, capitalized at 20 per cent the earnings of each company in excess of 10 per cent of the value of their tangible assets. This resulted in a total figure of $3,217,700.00, which the Commissioner of Internal Revenue thought plaintiff was entitled to include in its equity invested capital on account of good will. He, however, reduced this amount by $2,260,300 on account of what he considered "minus" or

"negative" good will of those companies whose net incomes were less than 10 per cent of the value of their tangible assets. In doing so, the Commissioner of Internal Revenue purported to follow A. R. M. 34; 2 C. B. 31 (1920), which was concerned with "methods of determining value as of March 1, 1913, of intangible assets."

Plaintiff's main contention is that neither this memorandum nor any other provision of law gave any authorization for reducing the "positive" good will of some of the subsidiary companies, whose income was more than 10 per cent of the value of their tangible assets, by the "minus" good will of other subsidiary companies, whose income was less than 10 per cent of the value of their tangible assets. This is the only issue presented on the amount to be included in invested capital on account of good will. Plaintiff did not complain, either in its petition or in its claim for refund, of the method employed by the Commissioner of Internal Revenue in determining the good will of companies earning more than 10 per cent of the value of their tangible assets; it complained alone of the deduction of "minus" or "negative" good will of companies earning less than 10 per cent of their invested capital.

Defendant does not admit that plaintiff acquired any good will as a result of the consolidation. It says that the parties at the time of the consolidation expressly excluded good will in determining the number of shares of plaintiff's stock to be issued for the stock of the companies it acquired and, hence, it is not entitled to include anything in invested capital for good will. But in any event, it says, plaintiff is not entitled to more than the amount found by the Commissioner.

Appendix "B"

Good will is an intangible, illusory, sometimes an ephemeral thing. Sometimes it has great value. But, the determination of that value is exceedingly difficult. Not infrequently the Commissioner of Internal Revenue uses the rule of A. R. M. 34 for this purpose. Under this rule he capitalizes earnings in excess of 10 per cent, and attributes the excess earnings to good will, although he recognizes that the excess may be attributable to other causes, and although some companies currently earning less than 10 per cent may have substantial good will. A. R. M. 34 is a rule of thumb by means of which some fair approximation can be reached of what part of plaintiff's income is attributable to the good will it has been able to build up in the trade. But, at best, it is only a rough approximation.

Ordinarily, the initial invested capital of a company is to be determied by the value of property paid in for its stock. This was the stock of the companies plaintiff acquired. The only basis for valuing their stock is the value of the assets of each, since there is no evidence of market value. The Commissioner of Internal Revenue thought that since some of these companies earned substantially more than 10 per cent of their invested capital, some amount ought to be included for good will. But he thought the plaintiff's good will ought to be determined on the basis of the situation after the acquisition of all of the companies.

It would be hard to find fault with this, although theoretically he should have considered each company separately, found the value of the stock it transferred for plaintiff's stock, and included this in plaintiff's invested capital. But we are dealing with that illusory, shadowy, intangible thing called good will,—what amount is plaintiff

entitled to include in its invested capital on account of the good will it enjoyed as the result of its acquisition of the stock of each of these companies. In such circumstances, it would seem proper to look at plaintiff's situation after the consolidation had been completed, in determining the value of everything it had acquired.

This would mean that we should take the aggregate value of all the tangible assets behind the stock of each company acquired by plaintiff and compare that aggregate with the aggregate income, and capitalize the excess over 10 per cent. This is what the Commissioner of Internal Revenue did in effect.

What he did in fact was to capitalize the earnings in excess of 10 per cent of each company. This he called positive good will. Then he capitalized the deficit under 10 per cent of each company earning less than 10 per cent. This he called negative good will. He then reduced the positive good will by the negative good will, and allowed plaintiff the balance as invested capital. It is obvious that the Commissioner arrived at the same result as if he had taken 10 per cent of the aggregate invested capital and capitalized the excess of the aggregate income over this 10 per cent.

Such a method seems to us just and fair under all the circumstances. It reflects what plaintiff received as a result of the consolidation.

There is testimony in the record of certain so-called expert witnesses who testified to the value of plaintiff's good will, but we find the computation made by the Commissioner of Internal Revenue more satisfying than the expert testimony. We think it more nearly approximates the actual value.

Besides, plaintiff in neither its petition nor its claim for refund contested the valuation of the good will of the companies earning more than 10 per cent as determined by the Commissioner of Internal Revenue.

Furthermore, Mr. Hossack, of the American Appraisal Company, on whose testimony plaintiff chiefly relies, assumed increased earnings in the future, based upon the trend in past years. On the contrary, the valuation of the Commissioner of Internal Revenue is based on actual experience, and not on supposition of what may happen in the future. "The lamp of expereince," we think, sheds the best light to guide our feet.

We are of opinion that the determination of the Commissioner of Internal Revenue is correct under the circumstances.

The other issue concerns the valuation of the land and buildings.

The Trial Commissioner finds that the Commissioner of Internal Revenue was not justified in reducing the valuation of the land and buildings placed on them by plaintiff. Defendant takes no exception to this finding. We have, therefore, adopted it. The valuations were those of the American Appraisal Company and the Ford, Bacon & Davis Company, reputable, nationally known and recognized appraisal companies. These reductions must be restored. Plaintiff is entitled to have its excess profits credit computed on this basis.

But, the defendant asserts that the amendments of April 3, 1950 and April 14, 1950 first asserted an undervaluation of land and buildings, and that they cannot be considered as an amendment of the original claim for refund, which was based alone upon an undervaluation of good will, and,

hence, it says, that plaintiff is entitled to recover only those tax payments which were made within two years of the filing of these amended claims for refund.

We are of opinion that the so-called amended claims for refund were not in fact amendments of the original claim, but injected new issues and that, therefore, the defendant is correct in saying that only those payments made two years prior to the filing of these amended claims can be recovered in this litigation, or so much thereof as exceeds the amounts which would have been due if the valuation of the land and buildings had not been reduced by the Commissioner of Internal Revenue. Judgment will be entered accordingly. The amount of the recovery will be determined pursuant to Rule 38 (c). If the parties desire to file a stipulation showing the amount due, computed in accordance with this opinion, they may have thirty days in which to do so.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* and JONES, *Chief Judge,* concur.

LITTLETON, *Judge,* dissents.

APPENDIX "C"

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957.

GENERAL OUTDOOR ADVERTISING CO., INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 5th, 1957.

(SGD) EARL WARREN
Chief Justice of the United States.

Dated this 13th
day of July, 1957.

APPENDIX "D"

Appeals and Review Memorandum 34, Cumulative Bulletin No. 2, Page 31:

Methods of determining value as of March 1, 1913, of intangible assets.

The Committee has considered the question of providing some practical formula for determining value as of March 1, 1913, or of any other date, which might be considered as applying to intangible assets, but finds itself unable to lay down any specific rule of guidance for determining the value of intangibles which would be applicable in all cases and under all circumstances. Where there is no established market to serve as a guide the question of value, even of tangible assets, is one largely of judgment and opinion, and the same thing is even more true of intangible assets such as good will, trade-marks, trade brands, etc. However, there are several methods of reaching a conclusion as to the value of intangibles which the Committee suggests may be utilized broadly in passing upon questions of valuation, not to be regarded as controlling, however, if better evidence is presented in any specific case.

Where deduction is claimed for obsolescence or loss of good will or trade-marks, the burden of proof is primarily upon the taxpayer to show the value of such good will or trade-marks on March 1, 1913. Of course, if good will or trade-marks have been acquired for cash or other valuable considerations subsequent to March 1, 1913, the measure of loss will be determined by the amount of cash or value of other considerations paid therefor, and no deduction will be allowed for the value of good will or trade-marks built up by the taxpayer since March 1, 1913. The following suggestions are made, therefore, merely as suggestions for

checks upon the soundness and validity of the taxpayers' claims. No obsolescence or loss with respect to good will should be allowed except in case of actual disposition of the asset or abandonment of the business.

In the first place, it is recognized that in numerous instances it has been the practice of distillers and wholesale liquor dealers to put out under well-known and popular brands only so much goods as could be marketed without affecting the established market price therefor and to sell other goods of the same identical manufacture, age, and character under other brands, or under no brand at all, at figures very much below those which the well-known brands commanded. In such cases the difference between the price at which whisky was sold under a given brand name and also under another brand name, or under no brand, multiplied by the number of units sold during a given year gives an accurate determination of the amount of profit attributable to that brand during that year, and where this practice is continued for a long enough period to show that this amount was fairly constant and regular and might be expected to yield annually that average profit, by capitalizing this earning at the rate, say, of 20 per cent, the value of the brand is fairly well established.

Another method is to compare the volume of business done under the trade-mark or brand under consideration and profits made, or by the business whose good will is under consideration, with the similar volume of business and profit in other cases where good will or trade-marks have been actually sold for cash, recognizing as the value of the first the same proportion of the selling price of the second, as the profits of the first attributable to brands or good will, is of the similar profits of the second.

Appendix "D"

The third method and possibly the one which will most frequently have to be applied as a check in the absence of data necessary for the application of the preceding ones, is to allow out of average earnings over a period of years prior to March 1, 1913, preferably not less than five years, a return of 10 per cent upon the average tangible assets for the period. The surplus earnings will then be the average amount available for return upon the value of the intangible assets, and it is the opinion of the Committee that this return should be capitalized upon the basis of not more than five years' purchase—that is to say, five times the amount available as return from intangibles should be the value of the intangibles.

In view of the hazards of the business, the changes in popular tastes, and the difficulties in preventing imitation or counterfeiting of popular brands affecting the sales of the genuine goods, the Committee is of the opinion that the figure given of 20 per cent return on intangibles is not unreasonable, and it recommends that no higher figure than that be attached in any case to intangibles without a very clear and adequate showing that the value of the intangibles was in fact greater than would be reached by applying this formula.

The foregoing is intended to apply particularly to businesses put out of existence by the prohibition law, but will be equally applicable so far as the third formula is concerned, to other businesses of a more or less hazardous nature. In the case, however, of valuation of good will of a business which consists of the manufacture or sale of standard articles of every-day necessity not subject to violent fluctuations and where the hazard is not so great, the Committee is of the opinion that the figure for determination of the return on tangible assets might be reduced

from 10 to 8 or 9 per cent, and that the percentage for capitalization of the return upon intangibles might be reduced from 20 to 15 per cent.

In any or all of the cases the effort should be to determine what net earnings a purchaser of the business on March 1, 1913, might reasonably have expected to receive from it, and therefore a representative period should be used for averaging actual earnings, eliminating any year in which there were extraordinary factors affecting earnings either way. Also, in the case of the sale of good will of a going business the percentage rate of capitalization of earnings applicable to good will shown by the amount actually paid for the business should be used as a check against the determination of good will value as of March 1, 1913, and if the good will is sold upon the basis of capitalization of earnings less than the figures above indicated as the ones ordinarily to be adopted, the same percentage should be used in figuring value as of March 1, 1913.